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SUBJECT: SCLAO DISCUSSES ANTI-MONOPOLY LAW
IMPLEMENTATION WITH FTC, DOJ

1. (SBU) SUMMARY. Federal Trade Commission (FTC) and Department of Justice (DOJ) officials raised United States concerns about China's draft Anti-Monopoly Law (AML) and proposed amendments to its 1993 Anti-Unfair Competition Law (UCL) in a March 30 meeting with State Council legislative Affairs Office (SCLAO) officials. SCLAO declined to predict when the National People's Congress (NPC) would enact the AML, noting the process was arduous because of the contentious issues involved. State Council departments would participate in the future Anti-Monopoly Commission, hopefully on a Ministerial-level. Promulgation of the AML would be followed by State Council formulation of implementation rules. The DOJ and FTC officials offered to share U.S. experience with antitrust law implementation. SCLAO said amendments to the UCL should be harmonized with the AML, as should other laws such as the Price Law. Whether the future AML would cover administratively authorized monopolies was not resolved. The SCLAO was open to further exchanges with United States antitrust experts on draft Chinese laws and competition policy. End summary.

Process for AML Enactment

2. (SBU) Asked about the status and prospects of the draft AML, SCLAO Deputy Director General (DDG) Dong replied that the draft AML had been submitted to the National People's Congress (NPC) where it had attracted considerable attention. While it was possible the NPC could conduct the minimum three readings within six-months, passage of the law would remain difficult due to competing legislative priorities and other barriers. The draft AML had provoked a wide ranging discussion at the State Council and more difficulties were expected during the NPC's readings. Dong declined to predict when the law would be passed.

3. (SBU) China's future AML would be important to China and the world, she continued. The AML was intended to promote market competition and enhance market efficiency. The demand for an AML in China to uniformly regulate market order had grown in the more than 20 years of economic reform as China moved from a

centrally planned economy to a socialist market economy and became even more integrated with the world economy following China's 2001 accession to the World Trade Organization. Existing problems in China's markets included such phenomena as abuse of dominant market position, mergers among undertakings, and administratively sanctioned monopolies.

14. (SBU) DDG Dong approvingly noted past helpful comments and suggestions from FTC, DOJ and Commerce Department officials. She said the draft AML reflected many of those recommendations.

Future Anti-Monopoly Authority?

15. (SBU) FTC General Counsel (GC) Blumenthal asked about the future Anti-Monopoly Commission and whether the SCLAO would be involved in structuring that future regulatory agency. DDG Dong said that according to the current draft AML, the Anti-Monopoly Commission (AMC) would be supervised under the framework of the State Council and be comprised of representatives from both State Council commissions and Chinese ministries, as well as outside academics and experts. Dong did not anticipate that the SCLAO itself would be a member of the AMC. While not specified in the draft, the State Council would likely appoint high level officials, such as Ministers, to the Commission.

AML Implementation Challenges

16. (SBU) DOJ's Stuart Chemtob inquired about the role of the State Council in the AML's implementation and

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whether preparations for implementation had begun in anticipation of the NPC passing the law. DDG Dong described the AML as a constitution for economic matters. Promulgation of the AML would be only a first step. Implementation would be a long and arduous road. China noted that implementation of corresponding laws in the United States, the European Union, and Japan had been very complicated. Dong said she expected to participate in the State Council's formulation of implementation rules. Departments responsible for legal enforcement would also participate. While no schedule had been decided for implementation, some efforts regarding implementation rules drafting had begun.

17. (SBU) The State Council would most likely focus on substantive rules, while procedural rule-making would largely be in the purview of China's courts and the NPC, DDG Dong continued. One should expect specific rules regarding administrative review of the AML. FTC's Tritell commented that DDG Dong has a realistic appreciation for anti-monopoly implementation difficulties. The United States would be happy to share its experiences from over 100 years in implementation of the antitrust laws, he said, which DDG Dong welcomed.

Status of UCL and Opportunities to Comment

18. (SBU) In response to a question concerning the relationship between the competition policy elements of the UCL and the draft AML, DDG Dong said the State Administration of Industry and Commerce (SAIC) was drafting amendments to the UCL and had not yet submitted a draft to the SCLAO. Dong would participate in a review of that draft after it reached the SCLAO.

¶9. (SBU) Reminded of the remarkably transparent procedures regarding access to the draft AML and opportunities to comment on it, Dong said she expected the same transparent procedures for the UCL once a draft was completed. Chinese laws and regulations on the legislative process mandated that most laws be made in the open and transparently, with the exception of laws and regulations concerning national security, foreign exchange and other specific situations. With regard to the draft UCL amendments, Dong said the draft may have been circulated domestically to individual departments and enterprises, but not to the United States.

¶10. (SBU) Dong added that China had also solicited public comments on the just enacted Property Law via the Internet. Public comments have also been sought on drafts of the Contract Law, Labor Contract Law and real estate regulations prepared by the State Council. In accordance with the annual State Council legislative plan, China would focus on transparency and openness and increasingly solicit public opinions. Drafts would also be delivered to experts and industry representatives and departments for comment. Dong encouraged the United States to pay more attention to Chinese requests for public comment. United States views could be submitted then and the SCLAO hoped to hear opinions from the United States on a broad range of issues.

¶11. (SBU) Pressed by FTC's Tritell on whether provisions of the UCL would be harmonized with provisions of the AML, DDG Dong acknowledged the importance of the issue while repeating that, although SCLAO intended to coordinate on the topic, it had yet to receive finished draft amendments to the law from SAIC. DDG Dong noted the two laws dealt with different subject matter. The AML regulated insufficient market competition while the UCL to regulated excessive competition. A precise definition of excessive competition had not yet been established, but in Dong's view it referred to acts such as fraudulent advertising.

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¶12. (SBU) DOJ's Chemtob pointed out that other Chinese laws also had competition-related provisions, e.g., the Price Law in part addressed predatory pricing and collusion. Would other laws' competition provisions also be harmonized with the AML? DDG Dong said yes without any further elaboration.

Contentious Administrative Monopolies Issue

¶13. (SBU) FTC's Tritell asked whether the issue of whether to subject or exempt administratively authorized monopolies from review under the AML had been contentious in NPC readings of the bill, as the topic had been during the bill's drafting. DDG Dong replied that NPC delegates had not formed consistent opinions on the matter. Similarly, comments collected from experts and the public were also divided. Opinions fell into two groups. First, someQ commentators observed that most countries regulated just three types of monopolistic activities -- namely, monopolistic acquisitions, dominant market positions, and mergers. The list did not include administrative monopolies, so this group argued that the issue need not appear in China's AML. A second set of commentators argued that inclusion of the issue in the draft AML would be beneficial to resolution of the unique problems associated with China's administrative monopolies. The NPC would make the final decision on whether administrative monopolies would be covered by the AML.

¶14. (SBU) FTC General Counsel Blumenthal said United States

officials were heartened to see administrative monopolies addressed in the current draft AML, and argued that addressing the issue in the AML was in China's self-interest. He encouraged DDG Dong and her colleagues to consider the United States' experience with the Commerce Clause of the Constitution and the European Union's experience with the Treaty of Rome as reference points for this contentious issue. DDG Dong noted that even in the absence of a promulgated AML, Chinese authorities had regulations to prohibit administrative restraints on economic activities in regional areas and reforms of certain administrative monopolies -- such as the oil, energy and postal industries -- had already begun. Even though the State Council would not be able to make the final decision about the AML's coverage of administrative monopolies, it would continue to make concerted efforts in other areas to address the problem.

¶15. (SBU) In closing, DDG Dong emphasized that the SCLAO had benefited from exchanges with DOJ, FTC, and Commerce Department officials on the AML. The SCLAO in time may reach out with additional questions or requests for help. United States laws and experience were the foundation driving China's development of its AML. SCLAO was happy to meet frequently with DOJ, FTC, and Commerce officials.

¶16. (U) SCLAO participants in this March 30, 2007 meeting included Deputy Director General Dong Chaojie and Zhang Yaobo.

¶17. (U) United States participants included FTC's General Counsel William Blumenthal, Randy Tritell, and Dina Kallay; DOJ's Deputy Assistant Attorney General Gerald Masoudi, Stuart Chemtob, and Hill Wellford, and United States Embassy economic officers Chris Beede and Matthew Dolbow.

¶18. (U) The FTC/DOJ delegation cleared this reporting cable July 18.

RANDT